

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE: EUGENE L. SHORE,

Debtor.

**Case No. 03-43072
Chapter 11**

**ORDER OVERRULING DEBTOR’S OBJECTION TO APPLICATION
OF EMPLOYMENT OF WRIGHT HENSON CLARK BAKER, LLP**

This matter is before the Court on Debtor’s Objection to Application of Employment of Wright Henson Clark Baker, LLP (Doc. No. 124). Because the Court has already entered an order approving the employment of Wright Henson (hereafter “WHCB”) as attorneys for the Unsecured Creditors Committee, entered January 26, 2004 (Doc. 52), which order was not appealed, this Court will interpret this Objection as a motion to now disqualify that firm as a result of matters occurring after the employment order. The Court heard evidence and argument on this Motion, and is prepared to rule.

Motions to disqualify counsel are viewed with disfavor, and disqualification is considered a drastic measure that courts should hesitate to impose except when absolutely necessary.¹ The party seeking disqualification of an opposing party's counsel must carry a heavy burden, and must meet a high standard of proof.²

The sole basis for the motion to disqualify is that WHCB *de facto* provided separate legal representation to Tri-Rotor, thus preferring one unsecured creditor over another. The evidence Debtor suggests supports this position is that the law firm’s facsimile machine, email, telephone, and secretarial

¹*In re Valley-Vulcan Mold Co.*, 237 B.R. 322 (6th Cir. BAP 1999).

²*Id.*

services were used to assist this out of town unsecured claimant in filing its proof of claim. The implication of that action, according to Debtor, is that WHCB will have a conflict in making a decision whether to object to that Proof of Claim as being untimely, as its attorney, Patricia Hamilton, would have to be a witness in support of Tri-Rotor.

Debtor also suggests that, more significantly, Hamilton will have to take steps to try, at any cost, to defeat confirmation of any plan proposed by Debtor, and to have the case dismissed, so as to protect herself, and her firm, from a possible malpractice action for not timely filing the claim, if the Court ultimately ruled that the claim was untimely. Debtor argues that such attempts to seek the dismissal of the bankruptcy also create a conflict, because in doing so, Hamilton would not have the best interests of her client group—the unsecured creditors—at heart, as they stand to receive a 100% dividend in the plan of reorganization.

The Court heard evidence demonstrating that Tri-Rotor has other counsel, located in Hugoton, Kansas, who it consults regarding bankruptcy matters, and who it consulted regarding the filing of the proof of claim that precipitated this dispute.³ The evidence was also clear that WHCB provided no legal advice to Tri-Rotor regarding the filing of the claim, nor obtained any information from Tri-Rotor in confidence. In fact, the evidence showed that Tri-Rotor relied, instead, exclusively on information received from the Bankruptcy Clerk's staff in attempting to find a local Topeka lawyer who could deliver its faxed proof of claim to the Court on the bar date.

The Court also finds, based upon the evidence received, that WHCB staff, in accordance with their

³The Court also notes that Tri-Rotor is also being represented in this bankruptcy by Topeka attorney, Wes Smith, who is not with the Wright Henson firm.

normal practice, reminded the creditor representatives on the committee for whom she is counsel, of the upcoming bar date. In response, Tri Rotor, which claims it had not previously received notice of the bar date, realized it would be unable to get its claim to Topeka in time for filing because of bad weather. After determining, through contact with the Bankruptcy Clerk's staff, that sending the Proof of Claim to the Clerk over its facsimile machine was not appropriate under the Court's local rules, Tri Rotor's staff prepared, and its President, Larry Smith, signed and faxed a proof of claim to Hamilton's secretary, who in turn gave it to a firm courier to deliver to the Clerk. It was delivered, albeit with a faxed, and not an original signature, on February 2, 2004, the bar date for such claims. There was no evidence that Ms. Hamilton, or any other lawyer at WHCB, played any role, whatsoever, in assisting in the preparation or filing of this claim, although clearly staff did assist in its delivery to the Clerk, and the firm is accountable for the actions of its staff. WHCB did not provide legal advice to Tri-Rotor; it merely served as a courier.

This Court has now decided, in overruling Debtor's Objection to Claim No. 25, that the filing was not a "fax filing," as that term is contemplated under LBR 5074.1. The Court has also found that Claim No. 25 is deemed timely filed, and that the amendment to Claim No. 25, found at Claim No. 26 and received one day after Claim No. 25, timely corrects the defective signature in the original claim.

For that reason, the only serious argument for this disqualification motion is moot. Hamilton did not need to, and did not, testify in opposition to Debtor's objection to Tri-Rotor's claim. In addition, the Court has found that WHCB did not provide legal advice to Tri-Rotor, in preference over other unsecured creditors, when its secretary sent a routine email reminding Tri-Rotor of the bar date. Furthermore, because the Court has found that Tri-Rotor's claim has been deemed timely, the argument that WHCB will be required to seek dismissal of the case to "cover" the firm's potential malpractice liability for not making

sure the claim was in fact timely filed, is inapposite.

In his closing argument, counsel for Debtor forthrightly admitted that if the Court ultimately found that the Tri-Rotor Proof of Claim was a timely claim against the estate, his argument for disqualification was not strong. He noted that WHCB's conflict, in that case, was that it reminded one creditor to file its claim, when the filing of that claim could result in the other creditors receiving a lesser dividend.⁴ He argues that WHCB should, as a result of those actions, be disqualified because of its dual representation of Tri-Rotor and the Unsecured Creditor's Committee under 11 U.S.C. § 1103(b).

That section, however, provides that "An attorney ... employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case." The statute further states that "Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." Although the Court has found that WHCB did not provide legal representation to Tri-Rotor, when its staff served as a courier or when it reminded Tri-Rotor of the bar date, §1103(b) does not provide support for Debtor's position, in any event, because Tri-Rotor has not been shown to have an interest adverse to other unsecured creditors.

This Court gives great deference to the choice made by a creditors' committee in selecting counsel, and that deference prevents this Court from reacting to conjecture, speculation and unwarranted inferences.⁵ The remoteness of the "adverse interest" espoused by Debtor herein, especially in light of the

⁴This argument is ironic, since in defending the motion to disqualify his counsel, Debtor Shore claims the unsecured creditors will receive 100% under the proposed plan.

⁵*In re Enron Corp.*, 2002 WL 32034346 (Bankr. S.D.N.Y.)

Court's ruling on the timeliness of the Tri-Rotor claim, requires this Court to find that WHCB's actions do not rise to a level, under 11 U.S.C. § 1103(b), of being adverse to the estate. Furthermore, WHCB's exceedingly limited role in filing Tri-Rotor's claim also does not make it "interested." Finally, this Court notes that no creditor, nor the United States Trustee, is claiming that WHCB's actions create a conflict, and this Court agrees.

IT IS, THEREFORE, ORDERED, that WHCB is disinterested under the requirements of § 101(14), and it does not hold or represent an interest adverse to the estate under §§ 101(14)(E), 327(a) or 1103(b). The Court will also note that there is no present evidentiary basis upon which to exercise the Court's discretion under § 328(c) to support Debtor's request to disallow fees incurred to date, and so that request is also denied at this time on this basis. Therefore, Debtor's Objection to Employment of Wright Henson Clark and Baker, which this Court has construed as a Motion to Disqualify, is denied in all respects.

IT IS SO ORDERED this _____ day of May, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF MAILING

The undersigned certifies that copies of the **ORDER OVERRULING DEBTOR'S OBJECTION TO APPLICATION OF EMPLOYMENT OF WRIGHT HENSON CLARK BAKER, LLP** was deposited in the United States mail, prepaid on this _____ day of May, 2004, to the following:

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